

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 21, 2022

Ms. Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

Re: Executive Director's Response to Hearing Requests for Jonathan
Carter Osinga and Laura Christine Osinga (Applicants)
TPDES Permit No. WQ0002959000
TCEQ Docket No. 2022-0273-IWD

Dear Ms. Gharis:

Enclosed please find a copy of the Executive Director's Response to Hearing Requests brief for the above referenced item. If you have any questions, please do not hesitate to contact me at 512-239-0611 or Michael.parr@tceq.texas.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael T. Parr II".

Michael T. Parr II, Staff Attorney
Environmental Law

Division Enclosure

TCEQ DOCKET NUMBER 2022-0273-IWD

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| APPLICATION BY JONATHAN & LAURA OSINGA FOR MAJOR AMENDMENT TO TPDES PERMIT NO. WQ0002959000 | § § § § | BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY |
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EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

I. Introduction

The Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Hearing Requests on the application by Jonathan Carter Osinga and Laura Christine Osinga (Applicants) for a Major Amendment to their Concentrated Animal Feeding Operation (CAFO) Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0002959000, which authorizes onsite composting, increasing the total number of dairy cattle from 990 head to a maximum capacity of 2,500 head, (1,500 head will be milking cows), increasing the total land application area from 78 to 171 acres, and after due diligence and a report of No Evidence Well," incorporating existing Well no.5 with a 150-foot buffer in the enlarged Land Management Units (LMUs) no.4. Touchstone Ranch Land, LLC, and Touchstone Ranch Recovery Center (collectively, 'Touchstone') filed a timely written hearing request.

Attached for Commission consideration are the following:

Attachment A - ED's GIS Map

II. Description of Facility

Overcrest Dairy or the CAFO facility (facility) is located at 17298 South US Highway 281, in Hico, Erath County, Texas. The facility is in the drainage area of the North Bosque River in Segment no.1226 of the Brazos River Basin. If the proposed permit is issued, the facility will consist of one Retention Control Structure (RCS no.1), one Slurry Basin and two Settling Ponds.

The total required capacity without freeboard for RCS no.1 is 28.97 acre-feet (ac-ft). The design calculations for RCS no.1 were revised and the required capacity was decreased from 30.17 to 28.97 ac-ft because the drainage area of RCS no.1 is being reconfigured because of the removal of pens and the conversion of RCS no.2 to Settling Pond no.2 with its changed design removal efficiency.

Specifically, the proposed permit authorizes enlarging the property's boundaries to include land to expand two LMUs (LMU no.3: 6 acres to 37 acres and LMU no.4: 11 acres to 51 acres), and combine and reconfigure existing LMUs (LMU no.1: 49 acres to 47 acres, LMU no.2: 12 to 36 acres).

III. Procedural Background

The TCEQ received the Major Amendment application on December 3, 2020, and declared the application administratively complete on January 14, 2021. The Applicants published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English in Erath County, Texas in the *Stephenville Empire Tribune* on January 21, 2021, and in Spanish in *La Prensa Comunidad* on January 26, 2021. The ED completed the Technical Review of the application on June 2, 2021, and prepared the proposed permit, which if approved, would establish the conditions under which the facility must operate. The Applicants published the Notice of Application and Preliminary Decision (NAPD) in English in Erath County, Texas in the *Stephenville Empire Tribune* on August 18, 2021, in Spanish in *La Prensa Comunidad* on August 26, 2021, and the public comment period ended on September 23, 2021. The ED filed the Response to Comments (RTC) on November 16, 2021, and the period for filing Requests for Reconsideration (RFR) or CCH requests ended on December 23, 2021.

Because this application was received after September 1, 2015, and because it was declared administratively complete after September 1, 1999, it is subject to both the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999, and the procedural requirements and rules implementing Senate Bill 709, 84th Legislature, 2015, which are implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.

IV. Evaluation of Hearing Requests

House Bill 801 established statutory procedures for public participation in certain environmental permitting proceedings, specifically regarding public notice and public comment and the Commission's consideration of hearing requests. The Commission implemented HB 801 by adopting procedural rules in 30 TAC chapters 39, 50, and 55. Senate Bill 709 revised the requirements for submitting public comment and the commission's consideration of hearing requests. This application was declared administratively complete on September 5, 2018; therefore, it is subject to the procedural requirements adopted pursuant to both HB 801 and SB 709.

A. LEGAL AUTHORITY TO RESPOND TO HEARING REQUESTS

"The executive director, the public interest counsel, and applicant may submit written responses to [hearing] requests".¹

Responses to hearing requests must specifically address:

- 1) whether the requestor is an affected person;
- 2) whether issues raised in the hearing request are disputed;
- 3) whether the dispute involves questions of fact or law;
- 4) whether the issues were raised during the public comment period;
- 5) whether the hearing request is based on issues raised solely in a public

¹ 30 TAC § 55.209(d).

comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;

6) whether the issues are relevant and material to the decision on the application; and

7) a maximum expected duration for the contested case hearing.²

B. HEARING REQUEST REQUIREMENTS

For the Commission to consider a hearing request, the Commission must first determine whether the request meets certain requirements.

A request for a contested case hearing by an affected person must be in writing, filed with the chief clerk within the time provided . . ., based only on the requester's timely comments, and not based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.³

A hearing request must substantially comply with the following:

1) give the name, address, daytime telephone number, and where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

2) identify the person's justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the facility or activity in a manner not common to members of the general public;

3) request a contested case hearing;

4) for applications filed:

(B) on or after September 1, 2015, list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and

5) provide any other information specified in the public notice of application⁴.

² *Id.* At § 55.209(e).

³ 30 TAC § 55.201(c).

⁴ *Id.* At § 55.201(d).

C. REQUIREMENT THAT REQUESTER BE AN AFFECTED PERSON

To grant a contested case hearing, the commission must determine, pursuant to 30 TAC § 55.203, that a requestor is an affected person.

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Governmental entities, including local governments and public agencies with authority under state law over issues raised by the application may be considered affected persons.

(c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person;

(6) whether the requester timely submitted comments on the application which were not withdrawn; and

(7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.⁵

(d) In making this determination, the commission may also consider, to the extent consistent with case law:

(1) the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;

(2) the analysis and opinions of the executive director; and

(3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.⁶

D. REFERRAL TO THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

"When the commission grants a request for a contested case hearing, the commission shall issue an order specifying the number and scope of the issues to be

⁵ 30 TAC § 55.203(a)-(c)

⁶ *Id.* At § 55.203(d).

referred to State Office of Administrative Hearing (SOAH) for a hearing.”⁷ “The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue:

- (1) involves a disputed question of fact or a mixed question of law and fact;
- (2) was raised during the public comment period by an affected person; and
- (3) is relevant and material to the decision on the application.”⁸

V. Analysis of the Hearing Requests

For this permit application the relevant public comment period ended on September 23, 2021, and the period for filing an RFR or a CCH request ended on December 23, 2021. The ED analyzed the CCH requests to determine whether they followed Commission rules, if the requesters qualified as affected persons, what issues may be referred for a possible hearing, and the appropriate length of any hearing.

A. WHETHER THE REQUESTS COMPLIED WITH 30 TAC §§ 55.201(C) AND (D).

1. **Touchstone Ranch Land, LLC and Touchstone Ranch Recovery Center (collectively, “Touchstone Ranch”)** – filed a timely, written hearing request that provided the requisite contact information, raised issues that form the basis of the hearing request in timely comments not withdrawn before the ED filed the RTC, and requested a hearing.

Touchstone Ranch’s hearing request stated that it is a 26 bed, state licensed Residential Detoxification, Intensive Residential, Supportive Residential, Intensive Outpatient Treatment Center for persons being treated for substance use disorder and co-occurring psychiatric conditions whose clients already have compromised health conditions which can potentially increase their risk of infections. Touchstone Ranch’s clients reside on the Touchstone Ranch property 24 hours a day/seven days a week. Touchstone Ranch also stated that it relies on the area’s groundwater for its well that provides water for Touchstone Ranch.

Touchstone Ranch’s request complied with 30 TAC §§ 55.201(c) and (d) because it identified and described a personal justiciable interest in a written explanation plainly describing why Touchstone Ranch believes it will be adversely affected by the application in a manner not common to the public.

Touchstone Ranch’s concerns, raised in its comments and hearing request, about foul odors, dust, vectors and whether the proposed permit controls odors, dust and vectors; whether the proposed permit protects surface and groundwater quality; whether the proposed permit contains the correct nutrient application rates, and whether the Retention Control Structures are proposed to be designed and operated to be protective of the environment and compliant with the TCEQ rules, are protected by the law under which the application will be considered and suggest that Touchstone Ranch has an interest not common to the general public.

⁷ 30 TAC § 50.115(b).

⁸ *Id.* At § 50.115(c).

The ED recommends finding that Touchstone Ranch's CCH request substantially complied with 30 TAC §§ 55.201(c) and (d).

B. WHETHER REQUESTERS ARE AFFECTED PERSONS UNDER 30 TAC § 55.203.

1. **Touchstone Ranch** – filed a CCH request that identified a personal, justiciable interest affected by the application, describing in plain language in a brief, written statement of how and why Touchstone Ranch believes it will be adversely affected by the proposed MUD facility in a manner not common to members of the public.

According to the ED's GIS map, Touchstone Ranch is located in close proximity to the Applicant's facility, highlighting that a reasonable relationship exists between the interests claimed and the activity regulated, increasing the possibility Touchstone Ranch may suffer adverse effects not common to the public by this application due to its proximity to the facility.

The ED recommends that the Commission find that Touchstone Ranch is an Affected Person under 30 TAC § 55.203.

C. WHETHER THE ISSUES ARE REFERABLE TO SOAH

In addition to recommending to the Commission those persons who qualify as affected persons, the ED analyzes issues raised in accordance with regulatory criteria. Unless otherwise noted, the issues discussed below are considered relevant, disputed and were raised during the public comment period and addressed in the ED's RTC. None of the issues were raised solely in a comment which has been withdrawn. For applications submitted on or after September 1, 2015, only those issues raised in a timely comment by a requester whose request is granted may be referred.⁹

Issues raised in the Hearing Requests:

The Following issues were raised in the CCH Requests:

1. **Whether the Applicant and the proposed permit comply with TCEQ requirements related to odor control, dust, and vector control.**

(RTC Response No. 2) This is an issue of fact. If it can be shown that the Applicant, proposed permit, and proposed, enlarged facility, if granted permission to operate, will cause adverse impacts to surrounding property owners from a lack of controls for odor dust and vectors, that information would be relevant and material to a decision on the application.

The ED concludes that this issue is relevant and material and should the Commission decide to refer this case to SOAH, the ED recommends referring this issue.

2. **Whether the proposed permit is protective of surface and ground water quality in accordance with TCEQ rules.**

(RTC Response No.3) This is an issue of fact. If it can be shown that the

⁹ TX. GOV'T CODE § 2003.047(e-1); 30 TAC § 55.211 (c)(2)(A)(ii).

proposed permit does not protect surface and ground water quality in accordance with TCEQ rules, that information would be relevant and material to a decision on the application.

The ED concludes this issue is relevant and material and should the Commission decide to refer this case to SOAH, the ED recommends referring this issue.

3. Whether the proposed permit contains the correct nutrient application rates.

(RTC Response No.4 and 5) This is an issue of fact. If it can be shown that the proposed permit does not contain the correct nutrient application rates, that information would be relevant and material to a decision on the application.

The ED concludes this issue is relevant and material and should the Commission decide to refer this case to SOAH, the ED recommends referring this issue.

4. Whether the proposed, redesigned Retention Control Structures are in the proposed permit, are proposed to be designed and operated to be protective of the environment and compliant with the TCEQ rules.

(RTC Response No.7) This is an issue of fact. If it can be shown that the proposed, redesigned Retention Control Structures are not proposed to be designed or operated to be protective of the environment and compliant with the TCEQ rules, that information would be relevant and material to a decision on the application.

The ED concludes this issue is relevant and material and should the Commission decide to refer this case to SOAH, the ED recommends referring this issue.

VI. Requests for Reconsideration

The ED did not receive any RFRs filed on this application.

VII. Contested Case Hearing Duration

If the Commission grants a hearing on this application, the ED recommends that the duration of the hearing be 180 days from the preliminary hearing to the presentation of a proposal for decision to the Commission.

VIII. Executive Director's Recommendation

The ED recommends the following actions by the Commission:

1. Find that Touchstone Ranch is an affected Person under 30 TAC § 55.203;
2. Grant the CCH requests of Touchstone Ranch;
3. Find that all other Requesters are not affected persons under 30 TAC § 55.203 and deny all other CCH requests;
4. Should the Commission decide to refer this matter to SOAH, first refer the matter to Alternative Dispute Resolution for a reasonable period; then refer

the matter to SOAH for a hearing not lasting longer than 180 days.

5. Should the Commission decide to refer this case to SOAH, refer the identified issues above in section (C)(1)-(4) to SOAH for a contested case hearing.

Respectfully submitted,

Texas Commission on Environmental
Quality

Toby Baker, Executive Director

Charmaine Backens, Deputy Director
Environmental Law Division

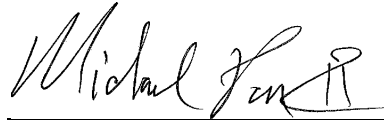


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REPRESENTING THE EXECUTIVE
DIRECTOR OF THE TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on March 21, 2022, the Executive Director's Response to Hearing Requests on the application by Jonathan & Laura Osinga for Major Amendment Permit No. WQ0002959000, was filed with the Chief Clerk of the TCEQ, and a copy was served to all persons listed on the attached mailing list via hand delivery, electronic delivery, inter-agency mail, or by deposit in the U.S. Mail.

A handwritten signature in black ink, appearing to read "Michael T. Parr II", is written over a horizontal line.

Michael T. Parr II, *Staff Attorney*
Environmental Law Division
State Bar No. 24062936

MAILING LIST
JONATHAN CARTER OSINGA AND LAURA CHRISTINA OSINGA
DOCKET NO. 2022-0273-IWD; PERMIT NO. WQ0002959000

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FOR THE CHIEF CLERK:

<https://www14.tceq.texas.gov/epic/eFiling/>

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REQUESTER(S)/INTERESTED PERSONS

See attached list

REQUESTER(S):

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INTERESTED PERSON(S):

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Austin, Texas 78701

Lauren J. Kalisek
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Attachment A

Overcrest Dairy GIS Map

Map Requested by TCEQ Office of Legal Services
for Commissioners' Agenda

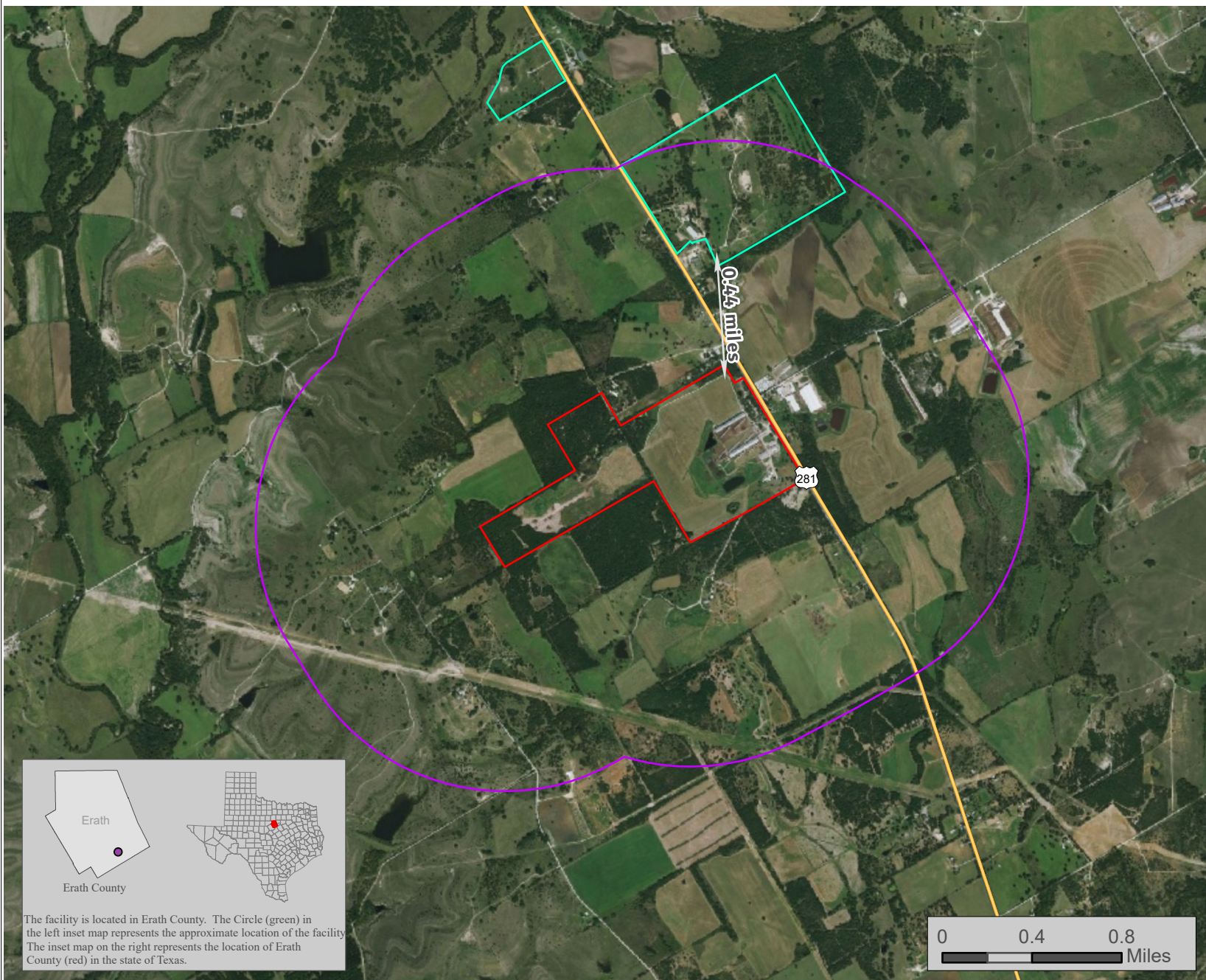


*Protecting Texas by
Reducing and
Preventing Pollution*

Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087
Date: 1/20/2022
CRF 0064492
Cartographer: jbartlin



-  Requestor
-  Facility
-  1 Mile Radius
-  Linear Distance



Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor.

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.